

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JEFFERSON CITY COMMONS, LLC,

Plaintiff,

-against-

08 Civ. 4866 (LAK)

MORAN FOODS, INC., etc.,

Defendant.
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ORDER

LEWIS A. KAPLAN, *District Judge*.

This is an action by a commercial landlord against a tenant alleging that the tenant improperly terminated the parties' lease for premises located in a Texas shopping center. The matter is before the Court on defendant's motion to dismiss the complaint for failure to state a claim upon which relief may be granted. Plaintiff, although its time to respond to the motion was extended, has filed no response.

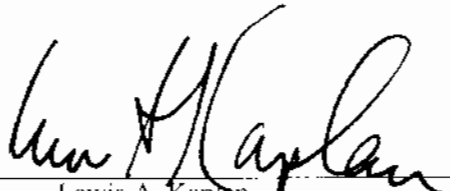
The lease in question gave defendant the right to cancel the lease in certain circumstances relating to the failure of the landlord to complete certain build out work and deliver possession. In due course, according to the complaint, the defendant tenant exercised its option to cancel, noting that the landlord had failed to complete the build out work and delivery actual exclusive possession as required. Cpt. ¶ 8 & Ex. B. The complaint seeks damages on the theory that the defendant tenant "fabricated a reason not to move in" and that the "reason provided for terminating the lease was a pretext." Cpt. ¶¶ 8, 9.

In order to state a claim for breach of contract, a plaintiff must "allege (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996). Under Fed. R. Civ. P. 9(c), it is sufficient "to allege generally that all conditions precedent have occurred or been performed." But plaintiff has not done even that. Accordingly, it has failed to state a claim upon which relief may be granted.

Accordingly, defendant's motion to dismiss the complaint is granted. As it is not clear that plaintiff cannot state a legally sufficient claim, however, it may file an amended complaint no later than July 23, 2008.

SO ORDERED.

Dated: July 9, 2008



Lewis A. Kaplan
United States District Judge

